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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FELIPE PADRON CHAVEZ, Defendant and Appellant.	H040499 (Monterey County Super. Ct. No. SS131960)

I. INTRODUCTION

Defendant Felipe Padron Chavez pleaded no contest to two felony counts of inflicting corporal injury on the mother of his child (Pen. Code, § 273.5, subd. (a))[1] and one misdemeanor count of willfully causing a child to suffer unjustifiable physical pain or mental suffering. (§ 273a, subd. (b)). The trial court suspended imposition of sentence and placed defendant on probation with conditions.

On appeal, defendant challenges a condition of probation that requires him to stay at least 100 yards away from the victims and "her home, vehicle, workplace and school." For reasons that we will explain, we will modify the probation condition to include an explicit knowledge requirement. As so modified, we will affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL BACKGROUND

According to the probation report, defendant was married to the victim, Jane Doe. On the evening of September 28, 2013, police officers received a report of domestic violence and responded to the hospital where Doe was receiving treatment. Doe was visibly bleeding and hyperventilating. She was found to a have a small nasal bone fracture and a contusion on the bridge of her nose.

When interviewed by police officers at the hospital, Doe stated that she was injured that morning during an argument with her husband. Defendant grabbed her by the hair, slapped her face several times, and hit her on the head with a belt while threatening to kill her. The couple's four children were present at the time.

Doe and defendant argued again when he returned home from work that day. Their four children were present. During the course of the argument, defendant " 'head-butted' " Doe once, which caused the cut on her nose and severe pain.

When defendant was taken into custody on September 28, 2013, police officers noted that he had visible blood on his shoes, hands, and face. Defendant told the officers that he had cut himself on a beer bottle.

III. PROCEDURAL BACKGROUND

The complaint filed in October 2013 charged defendant with two felony counts of inflicting corporal injury on the mother of his child (§ 273.5, subdivision (a); counts 1 & 4), assault with a deadly weapon (§ 245, subd. (a)(1); count 2), making criminal threats (§ 422, subd. (a); count 3), and two misdemeanor counts of willfully causing a child to suffer unjustifiable physical pain or mental suffering. (§ 273a, subd. (b); counts 5 & 6).

On October 9, 2013, defendant pleaded no contest to counts 1, 4, and 5 in exchange for receiving felony probation. During the sentencing hearing held on November 22, 2013, the trial court suspended imposition of sentence and placed defendant on formal probation for four years with several probation conditions. The trial court dismissed the remaining charges in the interests of justice pursuant to section 1385.

IV. DISCUSSION

On appeal, defendant challenges one of the probation conditions imposed by the trial court as unconstitutionally overbroad. The court informed defendant at the sentencing hearing that as a condition of probation, "you must stay at least 100 yards away from [the three victims],[2] her home, vehicle, workplace and school." Defendant contends that the probation condition should be modified to contain an explicit knowledge requirement.

A. *Threshold Issues*

As a threshold matter, we observe there is a discrepancy between the reporter's transcript and the clerk's transcript with regard to the language of the subject probation condition. The reporter's transcript of the November 22, 2013 sentencing hearing shows the trial court pronounced the probation condition as follows: "[Y]ou must stay at least 100 yards away from [the three victims], her home, vehicle, workplace and school." The November 22, 2013 minute order in the clerk's transcript includes a slightly different probation condition. According the minute order, as a condition of probation defendant must "[s]tay away at least 100 yards from the victim, the victim's residence, the victim's place of employment, and any vehicle the victim owns or operates."

The general rule is that the record of the oral pronouncement of the court controls over the clerk's minute order. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [oral pronouncement of probation condition of three months in county jail controls over clerk's minute order specifying five months]; cf. *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 586-587 (*Rodriguez*) [where there is an irreconcilable conflict between the reporter's

[2] The record reflects that the three victims include Jane Doe and two minor daughters. The trial court stated all three victims' names when the court ordered the subject probation condition, and their names were subsequently redacted from the November 22, 2013 reporter's transcript.

transcript and clerk's transcript, the modern rule is adoption of the transcript due more credence under all the surrounding circumstances].)

On appeal, defendant has assumed in his arguments that the probation condition orally pronounced by the trial court at the November 22, 2013 sentencing hearing is controlling. In light of defendant's arguments and the general rule that the court's oral pronouncement controls, we will review the version of the probation condition orally pronounced by the trial court at the sentencing hearing: "[Y]ou must stay at least 100 yards away from [the three victims], her home, vehicle, workplace and school."

We also observe that defendant did not object to the probation condition in the proceedings below. However, the California Supreme Court has determined that the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*); see also *People v. Leon* (2010) 181 Cal.App.4th 943, 949 (*Leon*).) Defendant's arguments on appeal present pure questions of law without reference to the sentencing record, and we will therefore consider the substance of those arguments.

B. *Knowledge Requirement*

"The California Legislature has given trial courts broad discretion to devise appropriate conditions of probation, so long as they are intended to promote the 'reformation and rehabilitation' of the probationer. (. . . § 1203.1, subd. (j).)" (*In re Luis F.* (2009) 177 Cal.App.4th 176, 188.) However, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

In *Sheena K.*, the California Supreme Court considered a probation condition that ordered the defendant not to associate with anyone " 'disapproved of by probation.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The court found that "in the absence of an express requirement of knowledge," the probation condition was unconstitutionally vague. (*Id.* at p. 891.)

A similar result was reached in *Leon* where the challenged probation condition ordered: " 'No association with gang members.' " (*Leon*, *supra*, 181 Cal.App.4th at p. 949.) This court found the probation condition constitutionally defective because it "lack[ed] an explicit knowledge requirement." (*Id.* at p. 950.) Without the knowledge qualification, the condition rendered the defendant "vulnerable to criminal punishment for 'associating with persons not known to him to be gang members.' [Citation.]" (*Ibid.*) Therefore, this court ordered the probation condition modified to read as follows: " 'You are not to associate with any person you know to be or the probation officer informs you is a member of a criminal street gang.' " (*Ibid.*, fn. omitted.)

C. *Analysis*

Defendant challenges the subject probation condition on the ground that the condition is unconstitutionally overbroad. He explains that he could violate the probation condition "even if he did not know he was within 100 yards of the victims' vehicle, place of work, residence or school." For that reason, defendant requests that the probation condition be modified to state: "[D]o not knowingly come within 100 yards of the three people named by the court, or their home, vehicles, workplaces and schools you know to be those of the victims."

Pursuant to this court's decision in *Rodriguez*, *supra*, 222 Cal.App.4th 578, the People join in defendant's request for modification of the probation condition to "require that [defendant] 'not knowingly come within 100 yards' of the victims."

We find appropriate the People's concession that the probation condition should be modified to include an explicit knowledge requirement. "Given 'the rule that

probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights,' the knowledge requirement in probation conditions 'should not be left to implication.' [Citation.]" (*Leon, supra,* 181 Cal.App.4th at p. 950.) Absent an explicit knowledge requirement, the probation condition is constitutionally defective because defendant is vulnerable to punishment for unknowing violations of the condition. (See *Rodriguez, supra*, 222 Cal.App.4th at pp. 595-595.)

We will therefore order that the probation condition be modified to read as follows: "Do not knowingly come within 100 yards of the three victims named by the court during the sentencing hearing held on November 22, 2013, their home, vehicle, workplace and school."

V. DISPOSITION

The judgment (order of probation) is ordered modified as follows.

The probation condition stated in the November 22, 2013 minute order that provides that defendant must "[s]tay away at least 100 yards from the victim, the victim's residence, the victim's place of employment, and any vehicle the victim owns or operates" is modified to provide:

"Do not knowingly come within 100 yards of the three victims named by the court during the sentencing hearing held on November 22, 2013, their home, vehicle, workplace and school."

As so modified, the order is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.